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SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

2010 MAY 14 PM 1:09 ✓

JEANNE HICKS, CLERK

Katherine Glenn
BY: _____

IN THE SUPERIOR COURT OF STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA,

Plaintiff,

v.

STEVEN CARROLL DEMOCKER,

Defendant.

Cause No. P1300CR20081339

Division 6

STATE'S RESPONSE TO DEFENDANT'S
MOTION TO STRIKE JUROR 264804
(B.H.) AND 248161 (S.M.) PURSUANT TO
MORGAN, PENRY AND LOCKETT AND
TO RECONSIDER THE DECISION TO
STRIKE JUROR 254476 (J.S.) FROM THE
VENIRE PANEL

The State of Arizona, by and through Sheila Sullivan Polk, Yavapai County Attorney,
and her deputy undersigned, hereby submits its Response to Defendant's Motion to Strike Juror
264804 and 248161. Defendant's Motion should be denied for the reasons set forth below.

Law

A prospective juror who will automatically impose the death penalty once guilt is
found, regardless of the law, may not serve on the jury. *Morgan v. Illinois*, 504 U.S. 719
(1992). Conversely, a prospective juror who would automatically vote against the death
penalty also cannot serve. *Wainwright v. Witt*, 469 U.S. 412 (1985); *Witherspoon v. Illinois*,
391 U.S. 510 (1968). As the United States Supreme Court subsequently clarified, a

1 prospective juror cannot serve on a petit jury when his views would "prevent or substantially
2 impair the performance of [the juror's] duties," in accordance with the court's instructions and
3 the juror's oath. *Wainwright*, 469 U.S. at 424; *accord State v. Jones*, 197 Ariz. 290, 302
4 (2000), *cert denied*, 532 U.S. 978 (2001); *State v. Detrich*, 188 Ariz. 57, 65 (1997).

5 A trial court must excuse any member of the venire who cannot provide assurances
6 that his views about the death penalty will not affect his ability to decide the issues in the
7 case. *State v. Roque*, 213 Ariz. 193, 204 (2006); *State v. Canez ("Canez I")*, 202 Ariz. 133,
8 147 (2002). See also *State v. Kayer*, 194 Ariz. 423, 432 (1999) ("[O]ur case law is clear that
9 a trial judge must excuse any potential jurors who cannot provide assurance that they death
10 penalty views will not affect their ability to decide issues of guilt"), *cert. denied* 528 U.S.
11 1196 (2000). Where a prospective juror's comments are "ambiguous and inconsistent," it is
12 for the trial court to resolve the ambiguity in light of its assessment of the witness's
13 demeanor. *Roque*, 213 Ariz. at 205 (*Wainwright* recognized that it is sometimes impossible
14 to ask enough questions to make a potential juror's feelings clearly known, and the judge
15 witnessing the questioning may maintain a lingering impression of bias; *Wainwright*
16 approved exclusion of juror who was "afraid" her beliefs might affect her ability to impose
17 the death penalty).

18 Examples of statements from juror justifying their dismissal for cause include:
19

20 1. A prospective juror wrote in his questionnaire that capital punishment was
21 "barbaric and unsuitable for an advanced nation," and during *voir dire* he said that he was
22 against the death penalty "absolutely." Despite the juror's claim that he could "follow the
23 law," he equivocated about whether he would take his personal biases into the jury room.
24 *Glassel*, 211 Ariz. at 48.
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2. A prospective juror wrote in her questionnaire that she did not believe that anyone should receive the death penalty "regardless of the crime committed," and that "we do not have the right to take another life," -- a belief that she characterized as being "morally, personally, and religiously" held. While she did answer "no" to the question that asked if her beliefs were "so strongly held" that she would be reluctant to sit on the jury, her responses during *voir dire* "raised doubts about her impartiality." For example, when the prosecutor asked whether the existence of any mitigating circumstances would cause her to vote for life, she responded, "probably...yes." And she stated that when it comes to "heinous crimes or murders, there is [sic] always mitigating circumstances" and that she did not believe that there could be a case that would not have mitigating circumstances. *Glassel*, 211 Ariz. at 49.

The trial court correctly found that neither prospective juror B.H. nor prospective juror S.M. should be excluded for cause, based on the record and the court's observations of demeanor, honesty and other considered factors.

B.H. 264804

B.H. consistently stated that he could follow the judge's instruction on the law and consider both imposition of the death penalty and life imprisonment. TR at 6, line 21 through 7, line 9; and below. He stated that if a person is convicted of first degree murder and will be imprisoned for life, that fact would take care of his concern about a person being convicted of first degree murder, getting out of prison, and then committing another murder. "I think if they are in prison, they ought to stay there or execute them. **To try to decide whether somebody should live or die is a pretty serious thing, and you can't let yourself have a bias about that, you know.**" TR at 8, lines 8-12 (emphasis added). He stated that he could fairly decide whether a person is guilty. TR at 9 lines 8-12. He also indicated that

1 he could be fair in considering mitigation evidence. TR at 10, lines 14-19; at 13 line 19
2 through 14 line 3. He would consider a defendant's lack of criminal history and the fact that
3 he has children who still love him as mitigating circumstances. TR at 14, line 16 through 15
4 line 2.

5 B.H. also expressed his opinion is that the death penalty is appropriate for some
6 intentional and premeditated murders, that he could return a verdict that imposed the death
7 penalty under the proper set of circumstances, but would also be willing to consider
8 mitigation evidence in determining whether to impose such a penalty. TR at 15 lines 3-13.
9 He also expressed his willingness to listen to all of the evidence and fairly and impartially
10 evaluate it before making any decision. TR at 15 through 18.

11 When questioned by the defense regarding a defendant's right to remain silent, B.H.
12 stated, "And I don't think that there is anything wrong whether a person testifies or they don't
13 testify. That's, you know, they are exercising their right. Does that make them guilty? No.
14 TR 39, lines 3-6. He also stated that he generally doesn't have an opinion on the death
15 penalty but that he's not against it. TR at 40, lines 10-13.

16 As for his consideration of mitigating circumstances, B.H. stated there are
17 circumstances where a person would not have to pay with their life for committing
18 premeditated murder. TR at 41, lines 12-19. B.H. stated that he would consider mitigating
19 evidence, but in general he doesn't "think how a kid grows up has anything to do with what
20 he does when he is an adult." TR at 44, lines 17-25. When defense counsel attempted to get
21 B.H. to admit that he would not follow the law but would rather impose his own personally-
22 held beliefs as to mitigating circumstances, B.H. steadfastly stated that he would not do so.

23 MR. HAMMOND: If the Court says you should consider something,
24 you will consider it. But wouldn't it also be fair and honest to say in your mind
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1 it wouldn't deserve much consideration. We are talking about something that
2 doesn't have anything to do with the crime.

3 PROSPECTIVE JUROR NO. 45: I think the facts of the case, of what's
4 happening right then is the most important part of what I have to consider.

5 TR at 45, lines 10-17.

6 In considering all of B.H.'s testimony, the trial court was correct in concluding that
7 B.H. should not be excluded for cause.

8 S.M. 248161

9 When questioned by the State, S.M. affirmed that she could listen to all of the
10 testimony and look at all of the evidence fairly. TR at 8, lines 12-19. When asked about
11 keeping an open mind to the presentation of DNA evidence, S.M. agreed that she would keep
12 an open mind to the evidence. TR at 9, lines 1-7.

13 The Defense questioned S.M. about her view on weighing mitigation evidence. She
14 responded by saying "I can't say that I wouldn't consider it, but I don't know that I would -I
15 don't know the mitigating circumstances, to be honest, but it is hard for me to think that any
16 mitigating circumstances make murder okay, that it makes it excusable or, well, okay, I
17 understand now why that happened." TR at 17, lines 19-24. S.M. stated that she would listen
18 to the mitigation evidence. TR at 18, lines 14-18. S.M. stated throughout the voir dire
19 process that she would be open to evidence presented by the Defense specifically the
20 mitigation evidence. TR at 20, lines 10-14. TR at 19, lines 1-12. TR at 20 line 22 through 21
21 line 3.

22 She indicated that in her consideration of the penalty phase the death penalty would
23 not be her starting point and that she would be open to considering a life sentence.
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1 Prospective Juror No. 3: "I think I am not against the death penalty. But mainly, I
2 believe that if someone is guilty of a crime that hurts other people in society, I either want
3 them locked up forever or the death penalty. I don't want them out in society.

4 And my frustration with the system is if someone, a jury, has decided that they are
5 going to be put in jail for life, and they have a sigh of relief, okay, they are not going to be
6 out in society."

7 RT at 15 lines 16-25

8 S.M. stated that after finding a person guilty of first degree murder, the "starting
9 point" for a sentence would not be death but could be accomplished with a life sentence. RT
10 at 19, lines 1-15.

11 J.S. 254476

12 After extensive questioning by both the State and the Defense, this Court dismissed
13 J.S. as a potential juror. J.S. stated unequivocally that she could not impose the death penalty
14 ("impossible to impose death penalty" "As I sit here I don't think I could vote for the death
15 penalty" "I cannot vote for the death penalty"). *Wainwright, supra*. Additionally, J.S. stated
16 that she over-analyzes and over-thinks things. The State requested this juror be dismissed for
17 cause and the court agreed.

18 Conclusion

19 The Court found no cause to strike jurors B.H. and S.M. Each juror clearly indicated
20 that they would give due consideration to the evidence and witnesses presented at trial. The
21 motion to strike these jurors should be denied.

22 J.S. clearly stated that she is against the death penalty and she could not be
23 rehabilitated by the State. The motion to reconsider this juror should be denied.

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1 RESPECTFULLY SUBMITTED this 14th May, 2010.

2
3 Sheila Sullivan Polk
4 YAVAPAI COUNTY ATTORNEY

5 By: Joseph C. Butner (For)

6 Joseph C. Butner
7 Deputy County Attorney

8 COPIES of the foregoing delivered this
9 14th day of May, 2010 to:

10 Honorable Thomas J. Lindberg
11 Division 6
12 Yavapai County Superior Court

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